91-1782

Supreme Court, U.S.
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No. 91-_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

PAUL DELO,

Petitioner,

vs.

LARRY GRIFFIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI VOLUME II

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

LARRY GRIFFIN,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. 91-_____
	)	
PAUL DELO,	)	
	)	
Petitioner.	)	

INDEX TO PETITIONER'S APPENDIX
VOLUME II

		Pages
7.	Amended petition for writ of habeas corpus filed March 3, 1989-------	A-88
8.	Petition for writ of habeas corpus filed June 3, 1988--------	A-101
9.	Opinion of the Missouri Supreme Court in State of Missouri v. Larry Griffin, No. 63315, filed December 20, 1983----------	A-121
10.	Opinion of the Missouri Court of Appeals, Eastern District, in No. 52998, filed February 16, 1988---	A-164

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

LARRY GRIFFIN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No.: 88-1074C(2)
	)	
BILL ARMONTROUT,	)	
	)	
Respondent.	)	

PETITIONER'S FIRST AMENDED PETITION UNDER 28 U.S. SEC. 2254 FOR WRIT OF HABEAS CORPUS

Comes now petitioner, by and through his court appointed counsel, Daniel Gralike, and for his First Amended Petition Under 28 USC §2254 for Writ of Habeas Corpus, states as follows:

INTRODUCTION

Larry Griffin was charged by indictment with Capital Murder in Violation of Section 565.001 R.S. Mo.(1978). On June 26, 1981, after trial by jury in the Circuit Court of the City of St. Louis, Honorable James J. Gallagher, presiding, Larry Griffin

was convicted of Capital Murder. The jury recommended death as punishment.

During trial, appellant was represented by Frederick Steiger, private counsel. On August 7, 1981, the Honorable James J. Gallagher sentenced Larry Griffin to death by lethal gas. Larry Griffin timely appealed his conviction to the Supreme Court of Missouri alleging eight (8) points of error. On December 20, 1983, the Supreme Court of Missouri affirmed Larry Griffin's conviction and sentence by a divided Court. State v. Griffin, 662 S.W. 2d 854 (Mo. en banc 1983).

On November 16, 1984, Larry Griffin filed his pro se motion for post conviction relief pursuant to Supreme Court Rule 27.26, three subsequent amendments to Larry Griffin's pro se 27.26 motion were filed. As evidentiary hearing was held relative to

Griffin's 27.26 motion on October 31, 1986, before the Honorable Edward M. Peek, Twenty-Second Judicial Circuit. On February 23, 1987, Judge Peek overruled Larry Griffin's Rule 27.26 claim. Griffin timely appealed Judge Peek's order denying relief under Rule 27.26 to the Missouri Court of Appeals, Eastern District. On February 16, 1988, the Missouri Court of Appeals affirmed the judgment of Judge Peek's order.

Griffin timely filed his Motion for ReHearing or, in the Alternative, for Transfer to the Supreme Court of Missouri in the Missouri Court of Appeals on March 2, 1988.

On June 3, 1988, Larry Griffin filed his pro se Petition for Habeas Corpus in the United States District Court, Eastern District of Missouri. On January 26, 1989, the United States

Magistrate David D. Noce issued his order sustaining Larry Griffin's motion to substitute counsel and appoint present counsel, Daniel Gralike, as counsel.

GROUNDS AND SUPPORTING FACTS UPON WHICH PETITIONER IS BEING HELD UNLAWFULLY

Petitioner's rights guaranteed by the Fourth, Fifth, Sixth, Seventh, Eighth, and Fourteenth Amendments were violated on the following grounds.

GROUND ONE:

Petitioner was denied his constitutional rights, including his 6th Amendment right, to "be confronted with the witnesses against him," when the trial court overruled trial counsel's objection to, an in admitting into evidence over said objection, the testimony of State's witnesses, Police officers Thomas Murphy and Nick Frederickson, recit-

ing statements purportedly made to them by one Robert Campbell, in that said testimony was inadmissible hearsay.

GROUND TWO:

Petitioner's trial counsel, Frederick Steiger, was ineffective in that he utterly failed to contact, interview, guestion, or call Robert Campbell as a defense witness. Had trial counsel contacted, conversed, and called Robert Campbell as a witness, Campbell would have conclusively refuted the hearsay testimony of state witness Police Officer Thomas Murphy concerning the purported Campbell statements linking Petitioner to an alleged prior attempted assassination of Quintin Moss.

GROUND THREE:

Petitioner was denied his constitutional rights, including his rights to due process of law, when the trial court overruled trial counsel's objec-

tion to, and in admitting into evidence over said objection, the testimony of state's witness Missouria Moss, regarding verbal threats she heard from unknown individuals on the telephone in that said evidence was inadmissible hearsay and prejudicial for reason that the state failed to establish any connection between the alleged threatening telephone calls and the Petitioner.

GROUND FOUR:

Petitioner's trial counsel was ineffective in failing to properly and timely object to the testimony of State's witness Missouria Moss concerning verbal threats she received from unknown individuals over the telephone because said evidence was inadmissible hearsay and prejudicial.

GROUND FIVE:

Petitioner was denied his constitutional rights, including his rights to

due process of law, when the trial court improperly instructed the jury regarding the proof required to find the Petitioner guilty as a co-participant in the crime charged. Under the terms of the verdict director Instruction No. 6, if another person caused the death of Quintin Moss by shooting him with no act, assistance, or involvement of any kind by the petitioner, there could be a conviction.

GROUND SIX:

Petitioner's trial counsel rendered ineffective assistance of counsel when he failed to timely object to the State's verdict directing instruction, Instruction No. 6, and in failing to properly preserve this issue for review in his Motion for New Trial.

GROUND SEVEN:

Petitioner's trial counsel was ineffective at the punishment phase of

petitioner's capital murder trial in that he failed to present any mitigating evidence on petitioner's behalf.

GROUND EIGHT:

Petitioner's trial counsel was ineffective during the voir dire stage of trial in failing to question the jury panel whether they would automatically impose a sentence of death after a finding of capital murder.

GROUND NINE:

Petitioner's trial counsel was ineffective during the voir dire stage of trial in failing to attempt to rehabilitate jury panel members who had been disqualified as opponents to the death penalty.

GROUND TEN:

Petitioner's trial counsel was ineffective in failing to properly investigate petitioner's alibi defense.

GROUND ELEVEN:

Petitioner's trial counsel was ineffective during trial in that he failed to properly advise petitioner as to his right to testify during the penalty phase of trial.

GROUND TWELVE:

Petitioner was denied his constitutional rights, including his rights to due process of law, in that the trial prosecutor and/or other state authorities, engaged in prosecutorial misconduct in that during trial the State knowingly declined to utilize the immediately available testimony of Robert Campbell, but preferred the perjured testimony of police officer Thomas Murphy in the form of hearsay as to what Campbell purportedly said.

GROUND THIRTEEN:

That the cumulative effect of petitioner's trial counsel's errors, as aforesaid, deprived petitioner of the

right to effective assistance of counsel and the right to a fair and impartial trial during the guilt and punishment stages of trial, thereby depriving petitioner of his Fourth, Fifth, Sixth, and Fourteenth Amendment rights.

GROUND FOURTEEN:

Petitioner was denied his rights to the equal protection and due process of law by the admission of evidence during trial of alleged prior criminal conduct as articulated under GROUNDS ONE and TWO herein, and as a result of the trial prosecutor's repated innuendo of petitioner's evil character to establish a propatibility of guilt.

GROUND FIFTEEN:

Petitioner's trial counsel was ineffective in failing to properly object to the state's evidence and characterization of petitioner as a "Police Character".

GROUND SIXTEEN:

Petitioner was denied his constitutional rights, including his rights to equal protection and due process of law in that the Missouri statutory provisions, as applied, were unconstitutional in that the sole aggrevating circumstance in Petitioner's case was overly broad in its application and allowed the arbitrary and capricious imposition of the death penalty.

GROUND SEVENTEEN:

That the imposition of the death penalty against petitioner constitutes cruel and unusual punishment in violation of the rights secured by the Eighth Amendment of the United States Constitution, and Article I, Section 21 of the Missouri Constitution; that the sentence of death was imposed under the influence of passion, prejudice, and other arbitrary factors.

PRAYER OF RELIEF

WHEREFORE, the grounds and premises considered, petitioner prays for the following relief.

1. That this Court hold the sentence of death imposed upon petitioner and the conviction on which that sentence rests void and of no effect;

2. That the Court issue a writ of habeas corpus to have petitioner brought before it so that he may be discharged from his unconstitutional confinement and restraint, and relieved from his unconstitutional sentence of death;

3. That the Court conduct on evidentiary hearing for the purpose of providing Petitioner the opportunity to adduce supporting evidence of the grounds stated therein;

4. That the Court enter an Order, pursuant to Rule 6 of the rules

governing Title 28 U.S.C. Section 2254, that the petitioner be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedures;

5. That the Court continue to stay Petitioner's execution pending final disposition of the Amended Petition, pursuant to Title 28 U.S.C. Sec. 2251;

6. That the Court grant such further relief as may be deemed appropriate.

Respectfully yours,
--DANIEL J. GRALIKE--#32734
Attorney for Petitioner
8008 Carondelet, Suite 106
Clayton, MO 63105
(314) 863-5880

PETITION UNDER 28 USC § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

IN THE UNITED STATES DISTRICT COURT

EIGHTH DISTRICT

Name: Larry Griffin

Prisoner No.: CP10

Case No: 88-1708-C-2

Place of Confinement: DEATH ROW
Missouri State Penitentiary
Jefferson City, MO 65101

Name of Petitioner: (include name under which convicted) LARRY GRIFFIN v.
Name of Respondent: (authorized person having custody of petitioner): WILLIAM

ARMONTROUT, WARDEN, DEPARTMENT OF CORRECTIONS, JEFFERSON CITY, MO 65101

The Attorney General of the State of:

MISSOURI 88-1074-C-2

PETITION

1. Name the location of court which entered the judgment of conviction under attack CIRCUIT COURT OF THE CITY OF ST. LOUIS, MO.

2. Date of judgment of conviction: JUNE 26, 1986

3. Length of sentence: DEATH

4. Nature of offense involved (all counts): CAPITAL MURDER, DEATH

5. What was your plea? (Check one)

(a) Not guilty [X]

(b) Guilty [_]

(c) Nolo Contendre [_]

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

---

6. If you pleaded not guilty, what kind of trial did you have? (Check one)

(a) Jury [X]

(b) Judge only [_]

7. Did you testify at the trial?

Yes [_] No. [XX]

8. Did you appeal from the judgment of conviction?

Yes [XX] No. [_]

9. If you did appeal, answer the following:

(a) Name of court:
MISSOURI SUPREME COURT

(b) Result: SPLIT DECISION,
JUDGMENT AFFIRMED

(c) Date of result and citation, if known: DECEMBER 20, 1983
662 S.W.2nd 854

(d) Grounds raised: 8 points of error.

(e) If you sought further review of the decision on appeal by a higher state court, please answer the following:

(1) Name of court: n/a

(2) Result: n/a

(3) Date of result and

citation, if known:

n/a

(4) Grounds raised: n/a

(f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:

(1) Name of court: n/a

(2) Result: n/a

(3) Date of result and citation, if known:

n/a

(4) Grounds raised: n/a

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this

judgment in any court, state or federal?

Yes [x] No [_]

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court: Circuit Court of the City of St. Louis, Mo

(2) Nature of proceeding: Rule 27.26 to set aside or vacate sentence for ineffective assistance of counsel at trial

(3) Grounds raised: 30 separate allegations

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes [XX] No [_]

(5) Result:

Petition denied,
Division #18

(6) Date of result:

Affirmed by the
Missouri Court
of Appeal, E.D.
2/16/88 No. 52998
also affirmed
by the Missouri
Supreme Court on
5/21/88

(b) As to any second petition, application or motion give the same information:

(1) Name of court: n/a

(2) Nature of proceeding:
n/a

(3) Grounds raised: n/a

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes [_] No [_] n/a

(5) Result: n/a

(6) Date of result: n/a

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc.

Yes [x] No. [_]

(2) Second petition, etc.

Yes [_] No. [_]

(d) If you did *not* appeal from

the adverse action on any petition, application or motion, explain briefly why you did not: n/a

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: The improper admission into evidence during trial of testimony concerning: a) alleged threatening telephone calls to the decendent's family b) Hearsay statements of police officers concerning May 31, shooting

Supporting FACTS (state *briefly* without citing cases or law) At trial evidence was adduced that the family of

the decedent's family receiving threatening phone calls without linking said threats to petitioner: police officer Frederickson testified at trial about statements he heard form one Robert Campbell concerning a 5/31/80 shooting. Campbell later testified at petitioner's 27.26 hearing that he never said such to the officer.

B. Ground two: Petitioner was denied effective assistance of counsel in violation of his 6th and 14th amendment rights under the United States Constitution for reason that:

Supporting FACTS (state *briefly* without citing cases or law): a) counsel failed to contact an essential witness, Robert Campbell despite repeated requests to do so by petitioner and his family, b) trial counsel failed to present any mitigation evidence on be-

half of petitioner, c) counsel failed to adequately voir dire the jury panel concerning the death penalty, d) counsel for petitioner failed to proper advise petitioner of his right to testify during trial, 3) counsel failed to properly investigate petitioner's alibi defense.

C. Ground three: The Missouri Court of Appeals, E.D., ignored prevailing case law concerning the admissibility of threatening telephone calls not linked to the defendant.

Supporting FACTS (state *briefly* without citing case or law): The Missouri Court of Appeals, E.D., held that the failure of the state (during Trial) to offer evidence connecting these telephone threats to the petitioner renders

the testimony harmless. (At Page 11 of Opinion).

D. Ground Four: Prosecutorial Misconduct

Supporting FACTS (state *briefly* without citing cases or law): At trial the State of Missouri endorsed and subpeoned Robert Campbell. Campbell had been present at an earlier shooting attempt allegedly on the decedent, Quinton Moss. The state at trial attempted to link petitioner to the earlier shooting with statements purportedly made by Campbell immediately after this earlier shooting to police officers. On the day of trial, Campbell appeared pursuant to the state issued subpeona and informed the state that the information contained in the police officer's report was inaccurate. Thereafter, Campbell was told to leave by the

state, and the state then proceeded to adduce at trial the knwon false statements by way of the P.O.

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them:

---

14. Do you have any petition or appealnow pending in any court, either state or federal, as to the judgment under attack? Yes [_] No [xx]

15. Give the name and address, if known, of each attorney who represented you in the following

stages of the judgment attacked herein:

(a) At preliminary hearing: Grand Jury.

(b) At arraignment and plea Frederick Stieger P.C. St. Louis

(c) At trial Frederick Stieger, P.C.

(d) At sentencing Frederick Stieger, P.C.

(e) On appeal Frederick Stieger, P.C.

(f) In any post-conviction proceeding: Office of the Public Defender, St. Louis County and Robert Paskal,

P.C., and Daniel J. Gralike P.C.

(g) On appeal from any adverse ruling in a post-conviction proceeding: Daniel J. Gralike P.C., 8008 Carondelet, 211 Clayton, Mo. 63105 (314) 863-5005

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes [_] No [xxx]

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes [_] No [x]

(a) If so, give name and location of court which imposed sentence to be served in the future: _____

(b) Give date and length of the above sentence: _____

_____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes [_] No [x]

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 31, 1988
(date)

--Larry Griffin--
Signature of Petitioner

SUPREME COURT OF MISSOURI

en banc

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. 63315
	)	
LARRY GRIFFIN,	)	
	)	
Appellant.		

APPEAL FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
Division No. 20
Honorable James J. Gallagher, Judge

Defendant Larry Griffin, 26 years old at the time of trial, was convicted of the capital murder of Quintin Moss by a jury in the Circuit Court of the City of St. Louis and sentenced to death. He seeks reversal, contending there was prejudicial error in the court's instructions to the jury and in admitting certain evidence in the guilt phase of his trial. He also avers prejudicial error was committed in the reception of other evidence at the penalty stage of the trial and that the

death penalty violates the Federal Constitution. We affirm.

Although defendant does not directly attack the sufficiency of the evidence to support his conviction, we think it helpful in considering his several points to set forth in some detail the facts and reasonable inferences arising therefrom which the jury could reasonably have found in arriving at their verdict, ignoring contrary evidence and inferences. State v. Franco, 544 S.W.2d 533 (Mo. banc 1976), cert. denied, 431 U.S. 957 (1977).

Quintin Moss, a 19-year-old black male, lived with his parents in St. Louis. The record in this case leaves little room for doubt that he was involved in the illicit trafficking of drugs and that he plied his illegal trade near the intersection of Sarah

and Olive Streets in St. Louis, six blocks from his parent's place of abode.

Defendant, a black male, was the brother of Dennis Griffin. Reginald Griffin was a nephew of defendant and Dennis. Prior to the killing of Quintin Moss, the defendant and Reginald lived together with defendant's sister.

In the early hours of January 2, 1980, Quintin Moss and Dennis Griffin arrived at the Moss apartment, awaking Mr. and Mrs. Moss by knocking on the door and ringing the doorbell. Following an argument between Quintin and his father, the latter objecting to his son's bringing "that kind of person home with him", Dennis departed the premises. A short time later he was killed in an alley behind the Moss apartment. About a week later Quintin Moss was arrested for this killing but

subsequently released by the authorities. Thereafter, according to Mrs. Moss, she was the recipient of telephoned threats against her son's life because of the killing of Dennis Griffin. She opined the unidentified telephone caller was a "black male".

May 13, 1980: At about 2:00 or 2:15 in the afternoon, Quintin Moss and Robert Campbell, a black male, were together near the intersection of Sarah and Olive Streets. About 2:30 p.m. a black over brown older model Cadillac automobile, occupied by two black males, drove up and stopped. One of the occupants stepped out of the vehicle and fired four or five pistol shots in the direction of Quintin Moss and Robert Campbell, one bullet striking and wounding Campbell. The Cadillac, containing the two unidentified black males, then sped away. A short time

later Quintin Moss was seen beneath his bicycle at the scene of the shooting.

Mrs. Moss was at her home when she saw her son ride up on his bicycle. Quintin was visibly disturbed and upset and exclaimed he had just been shot at and showed her a dent on his new bicycle. He asked his mother to take him back to the scene of the shooting and she did so.

At about 3:00 p.m., a police officer saw defendant and Reginald Griffin in a black over brown 1968 Cadillac automobile about three miles from the shooting scene. Reginald was driving the vehicle. When the officer, driving an unmarked police car, pulled up along side the Cadillac and displayed his badge, the Cadillac accelerated and drove away. A chase ensued for some distance before the police officer's car and another detective's car forced

the Cadillac to a stop. Reginald Griffin was arrested for multiple traffic violations. No weapons were found.

June 26, 1980: Officer Jones, off duty at the time, was driving past 3656 Cook Street at about 4:00 p.m. He saw three black males near the house. He recognized defendant ("known to be a police character"), a second person wearing a red and white baseball cap, and a third person carrying what appeared to the officer to be a shotgun. Because of heavy traffic, Officer Jones was delayed in circling the block to investigate what he had observed. By the time he returned, the three men had disappeared.

State's witness Robert Fitzgerald, a white male, was standing beside his car at about 4:30 p.m. near the intersections of Sarah and Olive Streets while two other men were attempting to

repair it. Fitzgerald had earlier observed Quintin Moss in the vicinity and concluded Moss was engaged in selling narcotics. Moss was standing on the sidewalk near Fitzgerald's car when Fitzgerald saw a faded blue 1967 or 1968 Chevrolet drive up and stop behind his car. There were two black males in the front seat and a third in the rear seat. There was a burst of gunfire from the Chevrolet and Fitzgerald saw the defendant firing a pistol through the open window of the passenger side of the front seat of the car. The person in the rear seat was firing a semi-automatic rifle. The direction of the shots was towards Moss and he was struck 13 times by bullets. A passer-by, Wallace Connors, was struck in the buttocks by one of the bullets. Fitzgerald had an unobstructed view of the defendant throughout the shooting

and as the Chevrolet drove away. Fitzgerald saw the license plate on the rear of the car and memorized the number. He provided this information to the police and accompanied the officers to the police station where he identified defendant from a group of photographs as being the person firing the pistol from the front seat of the Chevrolet. A short time later Fitzgerald identified the Chevrolet as the vehicle which had been at the scene of the killing.

The 1968 Chevrolet was parked behind an apartment building and was unoccupied. In the vehicle the officers found a .30 caliber semi-automatic rifle, which contained a clip containing seven live rounds of ammunition, empty rifle shell casings, a .38 caliber revolver, a red and white baseball cap, and a court receipt bearing the name

"Reginald Griffin". When fully loaded the clip for the carbine would hold 31 rounds of ammunition. There was expert testimony that a bullet fragment found at the scene of the killing of Quintin Moss had been fired by the carbine, which Officer Jones testified was similar in appearance to the firearm one of the black males was carrying at the Cook Street address about 4:00 p.m. Officer Jones also testified the red and white cap was similar to the one he saw being worn by one of the two unidentified black males earlier. A .38 caliber bullet fragment found at the shooting scene was of the same general classification of the revolver found in the Chevrolet. Fitzgerald testified this revolver was similar to the one he saw defendant firing at Moss.

Defendant first asserts[1] that "the trial court committed prejudicial error in not properly instructing the jury regarding the proof required to find defendant guilty as a coparticipant in the charged events because the verdict director instruction failed to conform to the required MAI-CR 2d form in that the first paragraph of the verdict director instruction contained language significantly different than that prescribed in MAI-CR 2d 2.12."

Instruction No. 6 reads as follows:

> "If you find and believe from the evidence beyond a reasonable doubt:
>
> First, that on or about June 26, 1980 in the City of St. Louis, State of Missouri, the defendant or another

---

[1]In considering defendant's various points, the writer has borrowed liberally from the Per Curiam opinion handed down on June 30, 1983.

person caused the death of Quintin Moss by shooting him, and

Second, that the defendant and another person intended to take the life of Quintin Moss, and

Third, that the defendant and another person knew that they were practically certain to cause the death of Quintin Moss, and

Fourth, that the defendant and another person considered taking the life of Quintin Moss and reflected upon this matter coolly and fully before doing so,

then you are instructed that the offense of capital murder was committed, and if you further find and believe from the evidence beyond a reasonable doubt:

Fifth, that in the commission of such offense the defendant acted with such other person with the purpose of committing that offense,

then you will find the defendant guilty of capital murder.

However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense."

This case was tried in June 1981. Instruction No. 6 should have been in the form prescribed in MAI-CR 2d 2.12, effective January 1, 1979. However, the giving of Instruction No. 6 by the trial court was not prejudicial error. Instruction No. 6 followed the MAI-CR 2d 2.12 form adopted by Order of this Court entered April 14, 1981. That Order provided that the form adopted on said date "must be used on and after January 1, 1982, and may be used prior thereto and any such use will not be presumed to be in error."

Defendant next contends that "the trial court committed prejudicial error in refusing to give MAI-CR 2d 3.42 the circumstantial evidence instruction as requested by defense counsel because said instruction was appropriate in defendant's case and proper under the applicable case law and MAI Notes on

Use in that the bulk of the evidence presented at trial was circumstantial and much of the evidence was of a conflicting and inconsistent nature and MAI-CR 2d 3.42 would greatly have aided the jury in properly evaluating the evidence." Defendant concedes that both direct and circumstantial evidence were presented. "Where the evidence, as here, is partially direct and partially circumstantial, it is not necessary to give a circumstantial evidence instruction and the test as to submissibility is not that of a purely circumstantial evidence case." State v. Baldwin, 571 S.W.2d 236, 240 (Mo. banc 1978). The point is denied.

Defendant continues that "the trial court abused its discretion in denying defendant pre-trial motion in limine and in admitting over defendant's renewed objection at trial testimony

regarding the assault on Robert Campbell because said testimony was irrelevant and its probative value was outweighed by its inflammatory and prejudicial nature in that said evidence did not prove or disprove any fact in issue in this cause, none of the testimony presented either linked the assault on Campbell to appellant or to the charged crime herein, and that the testimony only served to draw the jury's attention away from the factual issues that it was called upon to resolve and thereby hinder the jury's ability to decide the principal case upon its merits."

From the circumstantial evidence about which defendant complains, a rational finder of fact could have concluded that defendant attempted to kill Quintin Moss on May 13, 1980, as Moss and Campbell stood within a few feet of the intersection of Sarah and Oliver.

"Relevant evidence is not inadmissible because it is prejudicial." State v. Wood, 596 S.W.2d 394, 403 (Mo. banc), cert. denied, 449 U.S. 876 (1980).

The firing on Campbell, standing alone, would not be relevant and would therefore be inadmissible. But the evidence surrounding the May 13 event involved Quintin Moss, and Campbell was merely incidentally involved as was Wallace Connors in defendant's June 26, 1980, successful effort to "get" Moss.

The relevancy of the evidence is thus to show a common scheme or plan and would therefore not be inadmissible because of its disclosure of another crime. State v. Williams, 652 S.W.2d 102, 110 (Mo. banc 1983); State v. Shaw, 636 S.W.2d 667, 671 (Mo. banc 1982), cert. denied, ___ U.S. ___, 103 S.Ct. 239 (1982). In fact, this situation bears many of the marks of State

v. White, 621 S.W.2d 287, 294-95 (Mo. 1981), in which a victim's excited utterance of a prior attempt on her life was acceptable as part of a continuing scheme to kill her. Admittedly, the facts here do not present the strongest possible case. But the admission of the May 13 attack is not prejudicially erroneous.

The salient facts of the May 13 incident are as follows: Police responded to a shooting report at Sarah and Olive and found a bleeding and dazed Robert Campbell. Quintin Moss was beside him. Campbell related that a black over brown "older Cadillac" carrying two negro males stopped. One of the occupants alighted and fired several shots from a gun, one of which struck Campbell in the leg.

Within a half hour of the May 13 attack in which Campbell was wounded,

police spotted Reginald and Larry Griffin in a black over brown 1968 Cadillac about three miles from the point of assault. Reginald was driving. When the Cadillac occupants observed police, they sped away to be caught shortly thereafter in a high speed chase. Both Reginald and Larry were inside the vehicle when ultimately stopped.

The fact that the black over brown Cadillac was found to be with only two doors rather than four doors as initially reported is not critical; the jury can assess that matter. Nor does the general description of the vehicle as given provide less reason for the police to be substantially suspicious, give chase and stop. State v. Carter, 572 S.W.2d 430, 435 (Mo. banc 1978) and State v. Clark, 607 S.W.2d 817, 819-20 (Mo.App. 1980) provide ample basis for

the admission of evidence regarding the Cadillac despite the minor discrepancies concerning its description. It was close enough in time, proximity and identity to allow its part in the episode to be given substantial billing.

Mrs. Moss related through the exicted utterance of her son Quintin that he was the intended victim of a shooting shortly after its occurrence. Under the facts as related, Quintin's statement that he "just had been shot at" qualifies for admission as an excited utterance. State v. White, 621 S.W.2d at 295; State v. Rogers, 585 S.W.2d 498, 504 (Mo.App. 1979). The jury could reasonably find that the statement was uttered shortly after an unusual occurrence while Quintin was under the effects of the episode and in an uncontrolled state of mind.

In State v. Van Orman, 642 S.W.2d 636 (Mo. 1982), at 639, we said:

> The essential test for admissibility of a spontaneous statement or excited utterance is neither the time nor place of its utterance but whether it was made under such circustances as to indicate it is trustworthy. The rationale of this exception to the hearsay rule is that where the statement is made under the immediate and uncontrolled domination of the senses as a result of the shock produced by the event, the utterance may be taken as expressing the true belief of the declarant. State v. Rogers, 585 S.W.2d 498 (Mo.App. 1979).

Under the evidence presented, we hold that both the statement of Robert Campbell and that of Quintin Moss were admissible as spontaneous statements or excited utterances. Considered together, they demonstrate a common scheme or plan to kill Quintin Moss and circumstantially point to the defendant. We find no prejudicial error.

Defendant contends that "the trial court committed prejudicial error in overruling defense counsel's objection to and admitting into evidence over said objection the testimony of state's witness Missouria Moss repeating verbal threats she heard from unknown individuals over the telephone because said evidence was inadmissible hearsay in that it was in court testimony of an extra judicial statement that was offered to prove the truth of the matters asserted therein."

First of all, the record discloses a proper and timely objection was not made by defendant to the question, nor was there a proper motion made to strike Mrs. Moss' answer. Further, there was no ruling by the court on defendant's tardy objection. Consequently, the point is not preserved for

our review. Plain error review is not warranted. The point is denied.

Defendant next asserts that "the trial court committed prejudicial error in overruling defense counsel's objection to and admitting into evidence over said objection the testimony of state's witness Missouria Moss reciting statements made to her by her son Quintin Moss because such evidence was inadmissible as hearsay and was not within the excited utterance exception to the hearsay rule in that the statement was not made under the immediate and uncontrolled domination of the senses as a result of the shock produced by the event and therefore the utterance was not sufficiently trustworthy to be admitted as an exception to the hearsay rule."

As indicated, supra, we are of the opinion that Quintin Moss' statement to

his mother falls within the spontaneous statement or excited utterance exception to the hearsay rule, and, therefore, admissible. State v. Van Orman, supra.

Defendant claims that "the trial court committed prejudicial error in overruling defendant's motion to strike from the transcript herein portions of the pre-sentence investigation read into the record by the trial court at the time of sentencing because the information that was read into the record was irrelevant and highly prejudicial to the defendant in that it concerned matters occurring subsequent to the jury's determination as to guilt and punishment in this cause."

The information read into the record is pertinent to our determination "[w]hether the sentence of death is excessive or disproportionate to the

penalty imposed in similar cases, considering both the crime and the defendant." Section 565.014, RSMo 1978. See Banks v. State, 237 Ga. 325, 227 S.E.2d 380 (1976). The point is denied.

Defendant avers that "the trial court abused its discretion in overruling defense counsel's objection to and admitting into evidence over said objection during the punishment determination portion of defendant's trial three close-up eight by ten inch color photographs of the wounds suffered by the victim in this cause because the prejudicial and inflammatory impact of these photographs greatly outweighed their probative value in that these photographs were entirely cumulative in nature as extensive testimony had been presented at trial detailing the number, nature, location, and type of wounds received by the victim and the

jury had already viewed a photograph of the victim's body showing said wounds."

The trial judge stated into the record that he believed the photographs were pertinent to the statutory aggravating circumstance which the state was required to prove beyond a reasonable doubt. See § 565.012.2(3), RSMo 1978. We agree. The point is denied.

Defendant finally contends that "the imposition of the death penalty in this case constitutes cruel and unusual punishment in violation of the eighth and fourteenth amendments to the Constitution of the United States because the statutory aggravating circumstance applied herein is unconstitutionally vague both on its face and as applied in that it is susceptible to widely differing interpretations thereby causing the death penalty to be imposed in an arbitrary and capricious manner."

The statutory aggravating circumstance found presented in this case by the jury was that the accused "by his act of capital murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person. . . ." Section 565.012.2(3), RSMo 1978.

In Liverpool, New York and Philadelphia S. S. Co. v. Commissioners v. Emigration, 113 U.S. 33, 39, 5 S.Ct. 352, 355, 28 L.Ed. 899 (1885), the United States Supreme Court warned against a court formulating "a rule of constitutional law broader than is required by the precise facts to which it is applied."

In Godfrey v. Georgia, 446 U.S. 420, 428 (1980), the United States Supreme Court held "that if a State wish-

es to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty."

Mindful of the Liverpool caution, and of the Godfrey constraint, we confine our holding to the facts in this particular case. According to the evidence, defendant created "a great risk of death" to at least seven persons by means of weapons sufficiently hazardous to strike the body of Quintin Moss thirteen times and to wound Wallace Connors. In our view, the finding by the jury of the statutory aggravating circumstance is constitutionally permissible.

Section 565.014.1, RSMo 1978, also mandates that this Court determine whether "the sentence of death was imposed under the influence of passion,

prejudice, or any other arbitrary factor. . ." The record demonstrates that the death sentence was not imposed under the influence of passion, prejudice or any other arbitrary factor.

Finally, § 565.014.1, RSMo 1978, mandates that this Court determine whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." This is the first case in which this Court has reviewed the imposition of the death penalty on the basis of the aggravating circumstance specified in § 565.012.2(3), RSMo 1978. Those cases in which both death and life imprisonment were submitted to the jury and which have been affirmed on appeal have been reviewed. State v. Mercer, 618 S.W.2d 1, 11 (Mo. banc), cert. denied, 454 U.S. 933 (1981). They do not point

to excessiveness or disproportionality in the sentence in this case.

The judgment is affirmed.

William H. Billings, Judge

Rendlen, C.J., Welliver, Higgins, Gunn and Donnelly, JJ., concur; Blackmar, J., dissents in separate opinion filed.

Execution date set for February 2, 1994.

SUPREME COURT OF MISSOURI
en banc

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. 63315
	)	
LARRY GRIFFIN,	)	
	)	
Appellant.	)	

DISSENTING OPINION

Judge Billings' able opinion deals correctly with most of the issues in this case, which was generally well tried. I regret that I cannot join in the affirmance, but I believe that the defendant was improperly burdened by evidence, which should not have been admitted, of the May 13, 1980 shooting involving Robert Campbell. The only eyewitness to the murder had a seriously flawed background, and his ability to observe and identify the gunman was also subject to question. The error, then, was prejudicial, and the only solution is a new trial.

I.

The principal opinion properly observes that, in a capital murder case, evidence of a prior attempt by the defendant on the victim's life is highly relevant in showing a continuing scheme or plan and in establishing the element of deliberation. By the same token, however, evidence which indicates the defendant's involvement is highly prejudicial if the defendant is not sufficiently tied into the prior attempt. There have been numerous reversals because the prosecution offered evidence of prior and relevant criminal conduct, without sufficiently tying the defendant into the prior offenses.[1]

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[1]State v. Hancock, 451 S.W.2d 6 (Mo. 1970); State v. Strickland, 530 S.W.2d 736 (Mo. App. 1975); State v. Crane, 559 S.W.2d 294 (Mo. App. 1977);
(Footnote Continued)

A lesson from the pages of history should be helpful. The famous case of State v. Hyde, 234 Mo. 200, 136 S.W. 316 (1911), involved a charge of murder of Colonel Thomas Swope, longtime resident of Jackson County and civic benefactor. The defendant, a physician, was his nephew by marriage. The prosecution claimed that Dr. Hyde had hastened Colonel Swope's death by deliberately prescribing medication which produced a lethal accumulation of arsenic. In an effort to bolster its case the prosecution tried to show that the defendant had used his medical knowledge in an effort to kill other members of the Swope family, by excessive bleed-

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(Footnote Continued)
State v. Lamb, 468 S.W.2d 209 (Mo. 1971). State v. Reese, 364 Mo. 1221, 1227, 275 S.W.2 304, 307 (1954), mentions the "dangerous tendency" of this kind of evidence.

ing of a stroke victim, and by introducing typhoid germs into food or water. The suggested motive was to increase his wife's inheritance. This Court reversed the conviction because it concluded that the state had not established homicide or attempted homicide in regard to the other members of the family. The defendant, therefore, was burdened by improper innuendo in making his defense.

Nobody identified the defendant as the perpetrator of the May 13 shooting. The only link to him is Robert Campbell's hearsay statement that the gunman was riding in a black-over-brown four-door older Cadillac, and the defendant's presence as a passenger in a black-over-brown two-door Cadillac.

No eyewitness to the May 13 shooting even testified. The state relied entirely on the testimony of a police

officer who interviewed Campbell at the scene. Campbell had been wounded in the leg. He lost substantial blood and was in a dazed condition. He described the gunman's car in response to a police officer's question.

Although the admission of Campbell's statements as "excited utterances" goes beyond any reported Missouri case applying this particular exception to the hearsay rule,[2] the conclusion is in line with the liberal view of modern authorities such as the Federal Rules of Evidence.[3] The holding will permit

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[2]This descriptive statement goes well beyond those involved in such recent cases as State v. White, 621 S.W.2d 287, 294 (Mo. 1981); State v. Rogers, 585 S.W.2d 498, 504 (Mo. App. 1979; State v. Jones, 620 S.W.2d 17 (Mo. App. 1971); State v. Collins, 607 S.W.2d 712 (Mo. App. 1980).

[3]Rule 803(2), F.R.E. See 4 Weinstein's Evidence, ¶ 803.2[4] (1981).

the introduction of evidence both in civil and criminal cases which would have been rejected under the prior law. But I do not disagree strongly with the majority on this particular portion of the court's holding.

The problem is that the police officer who interviewed Campbell definitely committed himself to Campbell's description of a four-door automobile. It makes no difference that the officer did not disclose the number of doors on direct examination. He read from his report, and agreed that he got the number of doors from the witness. It is almost as though the prosecution hoped that the full description of the car would not come out. The problem here is one common to hearsay exceptions. The declarant's statements were immutable. There is no leeway for exploring matters of degree.

The car in which the defendant was riding as a passenger was photographed and found to have only two doors. This appears with definiteness and certainty. Even without this discrepancy, one might wonder whether the description by make and color would be sufficient, in the absence of testimony about the number of similar cars. Cf. State v. Greer, 655 S.W.2d 593 (Mo. App. 1983). But we need not pursue the point, because the police did not find the same vehicle that the wounded witness described.

The principal opinion holds that "the jury" may resolve the discrepancy. How can the jury have any possible basis for saying that Campbell was wrong in the description he gave the police, and really intended to describe a different car? Cases holding that variation in description is not fatal

to the existence of possible cause for stopping and searching a vehicle are not sufficient to supply the required connection for evidentiary purposes.[4] The police were undoubtedly justified in stopping the car in which the Griffins were riding, but this does not provide the link required before evidence of another crime can be admitted.

The state argued that it is not necessary to prove the required linkage beyond reasonable doubt. I do not disagree. The phrase, "reasonable doubt" is designed to be addressed to juries. The foundation for admission of evidence of other crimes is a question for

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[4]Cited are State v. Carter, 572 S.W.2d 430, 435 (Mo. banc 1978) and State v. Clark, 607 S.W.2d 817, 819-20 (Mo. App. 1980), both of which dealt with the lawfulness of searches rather than with admissibility of evidence.

the trial judge. Some substantial connection is necesessary, however, as our cases repeatedly hold. Here the connection is lacking and the evidence should not have been admitted.

The prejudice is enhanced by the admission of evidence of threats against the life of Quintin, following the killing of Dennis Griffin. These threats were not tied to the defendant, and there was no occasion for admitting them. Their admission, standing alone, might not be prejudicial, because the jury might be expected to perceive the absence of a link, but here the prosecution was trying to plant in the jury's mind the suggestion that the defendant sought revenge against his brother's suspected killer. In contrast to the principal opinion, furthermore, I find the hearsay objection sufficient. The unconnected threats were not admissible

for their own sake. State v. Hicks, 535 S.W.2d 308, 312 (Mo. App. 1976). The prosecution sought to establish by innuendo the homicidal purpose of the voice on the other end of the line, and to relate it to the killing of the defendant's brother. The objection sufficiently warned the trial judge of the problem and the prejudices.

But the primary error relates to the admission of the events of May 13. They are not relevant, because they were not connected up. The error is prejudicial.

II.

The defendant challenges the capital murder verdict director, Instruction 6, on grounds, among others, as follows:

> Under the terms of the verdict directing instruction as given if another person caused the death by shooting him with no act, assistance, or involvement of any kind by

> the defendant appellant Larry Griffin ...
>
> there could be a conviction. I do not believe that the principal opinion responds fully to this point.

This claim is supported by the language of the instruction. Under the instruction the jury could return a verdict of guilty if it were to find as follows:

> First, that the defendant or A caused the death of Quintin Moss;
>
> Second, that the defendant and B intended to take the life of Quintin Moss;
>
> Third, that the defendant and B knew they were practically certain to cause the death of Quintin Moss;
>
> Fourth, that the defendant and B considered taking the life of Quintin Moss and reflected on the matter coolly;
>
> Fifth, that in the commission of such offense the defendant acted with B for the purpose of committing that offense.

The complaint about Instruction No. 6 is well taken. There has been a serious problem in getting literate and

comprehensible instructions in capital murder cases, especially when more than one defendant is involved, and this Court has sustained instructions which are grammatical and rhetorical monstrosities, in addition to being legally ambiguous.[5] If the instruction here challenged had referred to "defendant and that other person" in the second, third, fourth and fifth hypotheses the fault would have been corrected. The defendant is entitled to instructions which are comprehensible.

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[5]State v. Betts, 646 S.W.2d 94 (Mo. banc 1983); State v. McIlvoy, 629 S.W.2d 333 (Mo. banc 1982); State v. Newlon, 627 S.W.2d 606 (Mo. banc 1982); State v. White, 622 S.W.2d 939 (Mo. banc 1981). It seems that, in an attempt to force instructions into the MAI-CR2d mold, prosecutors and judges have come up with instructions which violate both MAI and rules of ordinary good usage.

This error, however, was not pointed out in the motion for new trial. Allegation 15 of that motion refers to a variance between the instruction given and MAI. The principal opinion correctly resolves this issue.

It is appropriate to insist on specific objection to instructions. My preference would be for requiring objections before the instructions are given, in the manner of Rule 30 of the Federal Rules of Criminal Procedure. An objection only in the motion for new trial comes too late to do any real good, but it is a firm requirement of our Rule 28.03. After examining the closing arguments, I am confident that the genuine issues were properly presented and that the jury was not misled or confused by the instruction, and so am unable to say that there was plain error in giving it.

III.

Because of my conclusion that a complete new trial is required I do not reach the question of punishment. I do, however, have some observations.

The evidence showed a gangland-type assassination, with two gunmen firing semiautomatic weapons from a moving vehicle. The scene was a public street and the danger to more than one person was patent. I agree with the holding in the principal opinion that the evidence supports the aggravating circumstance found by the jury, that there is no indication that the jury acted out of passion or prejudice, and that the sentence is not out of line with other cases in which the death penalty has been assessed. If one believes in capital punishment, and if the trial were free from error, this

case would seem to be a particularly appropriate one.

On points not discussed I agree with the principal opinion. For the error described, however, the judgment should be reversed and the case remanded for a new trial.

CHARLES B. BLACKMAR, Judge

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

DIVISION TWO

LARRY GRIFFIN,	)	No. 52998
	)	
Plaintiff-Appellant,	)	Appeal from the
	)	Circuit Court of
	)	the City of St.
	)	Louis
vs.	)	
	)	Honorable Edward
	)	Peek
STATE OF MISSOURI,	)	
	)	OPINION FILED:
Defendant-Respondent.	)	
	)	February 16, 1988

Movant was convicted of the capital murder of Quintin Moss. After a jury trial he was sentenced to death. His conviction was affirmed on direct appeal in State v. Griffin, 662 S.W.2d 854 (Mo.banc 1983) which contains a detailed discussion of the murder. Movant subsequently filed a pro se Rule 27.26 motion and counsel was appointed. An evidentiary hearing on the allegations in movant's amended petition was held before Judge Edward M. Peek in the Circuit Court in the City of St.

Louis. The court issued "Findings of Fact and Conclusions of Law" denying the movant's petition for relief. Movant, on appeal, raises three points of error, all of which assert that his trial counsel rendered ineffective assistance.

Our review in this case is limited to a determination of whether the findings, conclusions and judgment of the trial court are clearly erroneous. Rule 27.26(j). The trial court's findings and conclusions are clearly erroneous only if a review of the entire record leaves the court with a definite and firm impression that a mistake has been made. Stokes v. State, 688 S.W.2d 19, 21 (Mo. App. 1985).

Since the majority of movant's points on appeal allege ineffective assistance of counsel, the guidelines enunciated in Strickland v. Washington,

466 U.S. 668 (1984) and Seales v. State, 580 S.W.2d 733 (Mo. banc 1979) must govern our decision. In order for a convicted defendant to succeed on a claim of ineffective assistance of counsel entitling him to a reversal of a death sentence he must show, first, that counsel's performance fell below the standard of reasonable effectiveness. Strickland, 466 U.S. at 687. In assessing the performance of counsel the courts recognize the wide latitude given to counsel in making tactical decisions and must be highly deferential. Further, the movant must overcome the strong presumption that his attorney's conduct fell within the wide range of reasonableness, and that the actions of the attorney are considered sound trial strategy. Id. at 689. Second, the movant must show that he was prejudiced by the alleged deficient

performance. Id. at 692. The pivotal inquiry when the movant challenges a death sentence is whether there is a reasonable probability that absent the errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. Id. at 695.

In his first point movant contends that he was denied effective assistance of counsel in that his trial counsel failed to interview and call as a witness Robert Campbell. Campbell was the unintended victim of a prior attempt on Moss' life. On May 13, 1980 police responded to a report of a shooting at Sarah and Olive streets. There they found a bleeding and dazed Robert Campbell. Quintin Moss was beside him. Campbell told police that a black over brown older Cadillac carrying two black males stopped. One of the occupants

got out of the car and fired several shots, one of which struck Campbell in the leg. Within a half hour of that shooting police spotted movant and his nephew in a black over brown 1968 Cadillac three miles from the scene of the shooting.

Campbell did not testify at trial but his statements concerning the May 13 incident were introduced via the testimony of the officers who arrived at the scene of the shooting. Movant now claims that had Campbell been called to testify at trial he could have refuted the testimony of the police officers and would have stated that he was unable to identify movant as the gunman. The hearing court found that the actions of trial counsel were strategical decisions and as such were not a proper basis for finding trial counsel ineffective. We agree.

The attorney who represented the state at movant's trial testified at the evidentiary hearing that he sought to have Campbell testify to this prior attempt in order to prove scheme, knowledge, intent and premeditation in the later shooting of Moss. It was hoped that this testimony would also identify the defendant as the gunman in the later incident. It was the state's position that Campbell had told officers who arrived on the scene of the May 13 shooting that a black and brown Cadillac carrying two black males stopped at Sarah and Olive streets. One of the occupants alighted and fired several shots from a gun, one of which hit Campbell. After Campbell was transported to the hospital, the police brought the defendant to Campbell's hospital room for identification. Campbell expressed fear of Griffin and declined to identi-

fy him as the gunman. Campbell was subpoenaed to testify at the trial but prior to trial he told investigators that he feared Griffin and would leave the courtroom if needed to avoid testifying. After a diligent search, the prosecuting attorney was unable to locate Campbell the day of trial.

Movant's trial counsel had represented movant on other matters in the past. At the evidentiary hearing counsel testified that from the time of movant's arrest until his trial, counsel met with movant in excess of twenty or twenty-five times. During the course of these meetings every detail of movant's case was discussed including the possible testimony of Robert Campbell. Counsel was aware of the existence and contents of the police reports concerning the May 13 shooting. In particular counsel was famil-

iar with the substance of the statements made by Campbell to the police. Counsel stated, however, that he was unaware that Campbell had, at any time, expressed fear of movant. Counsel stated that he did not contact Campbell or seek to have him testify at trial for the following reasons:

> . . . [I]t was pretty clear from the reports that were given to us what their basic case outline was going to be. Our defense was one of alibi. And our pre-trial in terms of how specifically we would formulate our defense, our concerns with Mr. Campbell was [sic] keeping him out of the courtroom rather than bringing him in .... [I]t was my feeling or our feelings --whatever-- that the best way to present the defense was to make it a clean and simple alibi defense. I felt that we had some very good, very strong witnesses on the alibi, and a good circumstantial basis for it. And what we were trying to do was to limit what I saw the State's efforts to make a nexxus [sic] of this whole common scheme. And what we were trying to do, and what we did pre-trial on the motions was to try and keep as much of this out on the basis that it had absolutely nothing to do with Larry.

In furtherance of this strategy counsel filed a pre-trial motion in limine to exclude Campbell's testimony. That motion was overruled. However, defense counsel, in anticipation of this event, had prepared a fall-back position. Upon cross-examination defense counsel would attempt to elicit testimony from Campbell that he was unable to identify Griffin as the gunman in the May 13, 1980 shooting. However, none of these strategies came to fruition because, although he had been subpoenaed, Campbell could not be found on the day of trial and did not testify.

Campbell, some six years later, testified at the evidentiary hearing regarding the circumstances surrounding the May 13, 1980 shooting. While he stated that his back was toward the car carrying the gunmen, the bullet that struck him entered the side of his

right thigh, traversed it and went into his left thigh. Immediately after the shooting he was dazed and was taken to the hospital for treatment. While Campbell did not recall making any statements to the police regarding the car or its occupants he does not deny making any such statements.

Two police officers escorted two men to the hospital for possible identification, however, Campbell was unable to identify either as the gunman. Campbell stated that he did not know Griffin prior to the shooting and as a result had no reason to fear him. Campbell was not contacted by movant's attorney but was subpoenaed by the state to testify at trial. However, when he appeared on the day of trial he was told by a unidentified employee that he was no longer needed so he left. Campbell further stated that this would

have been his testimony had he been called to testify at movant's trial.

Movant's own testimony at the evidentiary hearing contradicts that of Campbell. Movant testified that after the May 13 shooting he and his nephew were escorted by the police to the hospital where Campbell was receiving treatment. When asked what Campbell said in response to movant's presence in the hospital movant replied, "He said that we was the ones." Movant testified that he told his attorney about this statement.[1]

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[1] In its Findings of Fact and Conclusions of Law the trial court made the following finding:

> According to the Court's recollection of the testimony at the evidentiary hearing, Robert Campbell did not say that movant "was not the person who had shot him", only that he could not identify Larry

(Footnote Continued)

Trial counsel has a duty to make reasonable investigations or to make a reasonable decision that a particular investigation is unnecessary. When ineffective assistance of counsel is raised, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel and judgment.

(Footnote Continued)

> and Reginald Griffin as the ones involved in the May 13 shooting. The only testimony to support movant's allegation came from movant himself who testified that Robert Campbell said "we wasn't the ones". (Emphasis added).

This statement is contradicted by the record. However, the court went on to conclude that the actions of counsel were trial strategy and denied movant his claim for relief. The primary concern on appeal is the correctness of the result reached by the trial court not the route taken to reach it. Weber v. Knackstedt, 707 S.W.2d 800, 804 (Mo. App. 1986).

Strickland, 466 U.S. at 691; Martin v. State, 712 S.W.2d 14, 16 (Mo. App. 1986). The reasonableness of counsel's decision regarding investigation may be substantially influenced by defendant's own statements or actions. Strickland, 466 U.S. at 691.

In the case before us, the course of action pursued by counsel was clearly a matter of trial strategy. Prior to trial counsel had before him a police report which contained Campbell's description of the car movant was seen in a half hour after the shooting; a police report that put Campbell in the middle of an apparent attempt on Moss' life; and most important, the movant's statement that he was positively identified by Campbell as the gunman. Counsel concluded that the mere fact that Campbell was in close proximity to Moss at the time of the 1980 shooting would

be the most damaging aspect of his testimony. Armed with the foregoing information, all of it damaging, counsel could have reasonably concluded that interviewing Campbell would have been fruitless and possibly even harmful. Further, if Campbell's testimony were offered at trial it would have, at best, merely established that he may or may not have made the statement contained in the report.

After considering the circumstances and affording counsel due deference we conclude that the decision not to interview and call Robert Campbell to testify at trial was supported by reasonable professional judgment and was a matter of trial strategy. Movant's first point is denied.

In his second point the movant avers that the hearing court erred when it declined to find trial counsel inef-

fective for failing to offer mitigating circumstances at the penalty phase of his trial. Movant argues that "trial counsel should have recognized and submitted the most obvious mitigating circumstance which the jury could have considered in assessing punishment-the victim's implication in appellant's brother's death." Failure to present this evidence along with counsel's failure to call family members to plead for his life , according to the movant, deprived him of effective assistance of counsel.

At the evidentiary trial hearing counsel stated that there were no statutory mitigating circumstances available to him but recognized that he was free to present evidence beyond that listed in the statute. He recognized that he could have put on family members to make a plea for mercy. However, the

defense was based on alibi and defendant had maintained his innocence throughout the trial. Counsel felt that presenting such evidence would send a message to the jury that said "we have been lying to you all week, but give us a break." Counsel felt that such a maneuver would undermine the credibility that he had been trying to establish throughout the trial. Movant testified that counsel had presented him with a list of statutory mitigating circumstances and he agreed with counsel that none of the statutory circumstances applied to his situation. When asked at the evidentiary hearing what information the jury should have heard about him that may have caused the jury not to recommend death movant replied, "I don't know". Movant fails to overcome the presumption that under these circumstances,

the course of action pursued by his trial counsel might be considered sound trial strategy. Id. The finding of the hearing court is not clearly erroneous. Rule 27.26(j). Point denied.

In his third point movant argues that the hearing court erred in failing to find his trial counsel ineffective for neglecting to file any pre-trial motions related to the death-qualification of the jury. This failure, he argues, deprived him of rights guaranteed him by the Constitution. The thrust of movant's argument appears to be that a reasonably competent attorney would have made a concerted effort to "life-qualify" the jury in response to the efforts of the state to death-qualify the jury. This failure, in movant's words, "undoubtedly left appellant with an unjust conviction and death prone petit jury".

After review of the record and pertinent case law, it is clear that movant is attempting to attack the death-qualification of a jury by using a back-door approach. Movant's reasoning is flawed. The Missouri Courts have consistently held that the death-qualification of capital juries does not violate the constitutional rights of criminal defendants. State v. Roberts, 709 S.W.2d 857, 868 (Mo. banc 1986); State v. Jones, 726 S.W.2d 400, 401 (Mo. App. 1987).

One of the questions asked of each potential juror by the state in its voir dire was, in essence, this: "If you were instructed that the death penalty is an alternative within the range of punishment, do you feel that you could consider imposing it after hearing all the evidence?" Any juror who answered that question in the negative

expressed his inability to follow the instructions of the court. A defendant does not have a right to be tried by jurors who explicitly express an inability to follow the law and the instructions of the court. State v. Stokes, 638 S.W.2d 715, 722 (Mo. banc 1982). If death-qualification of a jury is constitutionally permissible, trial counsel cannot be faulted for failing to take any action to prevent such qualification. The finding of the hearing court is not clearly erroneous and accordingly movant's third point is denied.

Movant's fourth point was first raised in this appeal of movant's post conviction proceeding by way of a supplemental pro se brief filed on December 23, 1987, fifteen days before the date set for oral argument. In that point movant avers that his trial coun-

sel was ineffective in that he failed to make a timely objection to the testimony of Missouria Moss concerning the contents of phone calls she received. While this court was not supplied with a transcript of the trial, it would appear from both the record before us as well as from the facts that appear in the direct appeal that during the course of Moss' testimony she "[repeated] verbal threats she heard from unknown individuals over the telephone . . . ." Griffin, 662 S.W.2d at 859. Movant now argues that such testimony was inadmissible as hearsay testimony and that its introduction without objection was "clearly prejudicial." On direct appeal the Missouri Supreme Court found that the issue had not been

preserved for review and did not warrant plain error review. Id.[2]

We need not determine whether the action or inaction of movant's trial counsel was deficient because movant

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[2] The hearing court, in its Order and Judgment issued on February 23, 1987, stated "[o]f the thirty or more allegations set out in pleadings, many are repetitious, others are not the proper subject of a Rule 27.26 Motion [e.g., '_ _ _ the trial court: Failed to _ _ _' (b) (1) - (5) of Pro Se Motion] and those which were not addressed at the evidentiary hearing or in the subsequent memoranda filed, are deemed abandoned."

However, our review of the record before us reveals that this allegation was properly raised as an issue of ineffective assistance of counsel in Section 8 (a) (6) of movant's pro se motion 27.26 which was filed on November 16, 1984. Further, the issue was addressed at the evidentiary hearing during direct examination of trial counsel by movant's attorney. Despite the fact that no findings of fact or conclusions of law were made by the hearing court on this issue we find the record sufficient to enable us to dispose of this issue.

has failed to show how he was prejudiced. Strickland, 466 U.S. at 699. Movant's trial counsel testified at the evidentiary hearing that he had filed a motion in limine to exclude the testimony of Ms. Moss regarding the phone calls she received. Although we were not provided with a transcript of the trial it would appear from the fact that such testimony was introduced that movant's motion was denied. However, trial counsel stated at the hearing, and movant concedes in his supplemental brief, that no evidence was presented by the state to connect movant to the phone calls. The bare fact that Ms. Moss received threatening phone calls without any evidence linking movant to those calls was, at most, irrelevant and cannot be assumed to be prejudicial absent any evidence to support such a

conclusion. Point denied. The judgment of the hearing court is affirmed.

JAMES A. PUDLOWSKI, Judge

STEPHAN, Presiding Judge and KAROHL, Judge,

CONCUR.